Supreme Court, U.S.
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No. 85-1604

In the Supreme Court of the United States

October Term, 1985

STATE OF UTAH,

Plaintiff-Petitioner,

v.

ROBERT PAUL PACHECO,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH
Case No. 20047

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED

Did the Utah Supreme Court err in construing *Francis v. Franklin*, ——U.S.——, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)

LIST OF PARTIES

The State of Utah by its Attorney General, and Robert Paul Pacheco, defendant in the criminal case.

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SUMMARY OF ARGUMENT

The Utah Supreme Court did not err in applying *Francis*, supra, and *Sandstrom*, supra, in the decision of this case.

OPINION BELOW

The State of Utah v. Robert Paul Pacheco, No. 20047, slip opinion contained in the petitioner's brief as Appendix A, pages 20 through 23, and Appendix B, the Supreme Court's denial of petition for rehearing.

PERTINENT FACTS

The Statement of The Case in the petition sets forth the following:

That on June 3, Detective Anderson was investigating a home burglary when he found the ring from which the contested instruction petitions (Appendix A, page 3, slip opinion, *State v. Pacheco,* Utah Supreme Court No. 20047, signed October 17, 1985).

It is clear that the alleged burglary of the Imai's dwelling was never reported and was apparently discovered on June 13, 1983 upon a neighborhood canvas by Murray City police cadets. (See Chief Justice Hall's opinion, *State v. Pacheco,* supra, at page 2 of the slip opinion.)

It is also clear that there was never any evidence in *State v. Pacheco,* supra, that the ring had been in the Imai's residence in Murray. Justice Hall sets forth the following, at page 3:

> ". . . the detective showed her the ring taken from defendant. Mrs. Imai positively identified it as her husband's. At trial, Mr. Imai also positively identified the ring as his. *Neither Mr. nor Mrs. Imai had seen the ring since before they had moved to Murray from Helper in the spring of 1983".* (Emphasis added.)

ARGUMENT

THE DECISION OF THE UTAH SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FRANCIS v. FRANKLIN*

OR, AS SET FORTH IN THE *FRANCIS* CASE, WITH THIS COURT'S DISCUSSION OF THE APPLICATION OF *SANDSTROM v. MONTANA*, SUPRA.

The appellant has chosen to consider the reasoning in Justice Rehnquist's dissenting opinion in the *Franklin* case, supra, pages 1980 through 1985, for its argument rather than the majority opinion. The unanimous opinion of the Utah Supreme Court took pains to point out that it was not holding that U.C.A. 76-6-402(1) (1953) was unconstitutional, but was directed to the court in determining whether there was a prima facie case to go to the jury. The instruction sets forth that statute verbatim and the Utah Supreme Court finds the jury instruction to be unconstitutional in shifting the burdon of proof from the State to the defendant citing *Franklin*, supra, at pages 1965 and 1971, and *Sandstrom*, supra, at pages 517-18.

Franklin and *Sandstrom* both contain mandatory presumptions referring to intent rather than a prima facie presumption of larceny as in the case at the bar. Also, both contain additional instructions regarding shifting of the burden of proof and general instructions as to the presumption of innocence. In the *Pacheco* case, at pages 1950-1952, Chief Justice Hall further cites *State v. Chambers*, 709 P.2d 231 (Utah 1985).

As pointed out in Judge Hall's findings of fact, there was no evidence, other than the possession of stolen property, to show either burglary or theft; no evidence of

breaking and entering the Imai's residence, or any evidence of an unauthorized person being at the house, even though Mrs. Imai's mother was present the entire day of the alleged burglary.

CONCLUSION

It is clear that the Utah State Supreme Court did not err; there is nothing in the *Pacheco* opinion which is at variance with either the *Francis* or the *Sandstrom* cases, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on the 18th day of June, 1986, three copies of the foregoing Brief in Opposition to Petition For Writ of Certiorari were delivered to David L. Wilkinson, Utah Attorney General, attention Earl F. Dorius, Assistant Attorney General, Chief, Governmental Affairs Division, 236 State Capitol, Salt Lake City, Utah 84114.

SUMNER J. HATCH

)
ss. NOTARY PUBLIC, Residing In
) Salt Lake County, State of Utah

Subscribed and sworn to before me this 18th day of June, 1986.

My Commission Expires: May 24, 1990